L 9 (9-66)

Corp. Tax Determinations
4-2

BUREAU OF LAW

MEMORANDUM

Skampelon, Inc.

TO: Commissioners Murphy, Macduff and Conlon

FROM: E. H. Best, Counsel

SUBJECT: Application of Skampelon, Inc., for revision or refund of franchise taxes under Article 9-A of the Tax Law for the fiscal year ended May 31, 1962

A hearing with reference to the above matter was held at the office of the State Tax Commission, Corporation Tax Bureau, 80 Centre Street, New York, New York on October 19, 1965. Appearances were as noted on the transcript of the hearing.

The issues involved are (1) whether the value of out-of-state rented property should be included in the property factor, and (2) whether the taxpayer maintained a permanent or continuous place of business without the State, for the purpose of determining the receipts factor, in arriving at the business allocation percentage.

The taxpayer is a domestic corporation having its office and principal place of business in New York, and is engaged in the manufacture of children's underwear. Sales, purchasing, designing and record keeping activities are performed in New York. The actual fabrication is performed in Pennsylvania, by a contractor, Terre Hill Manufacturing Company, Inc., an otherwise unrelated company. Taxpayer leases 20,000 square feet on the second floor of the building owned and occupied by the contractor, at an annual rental of $23,200, for storage of finished goods, until shipped to customers by employees of the contractor. One employee of the taxpayer, its production manager, is stationed at the contractor's factory to supervise production. A shipping crew is employed by the contractor to handle the taxpayer's finished goods. A charge for these services is made to the taxpayer by the contractor. The shipping supervisor was remunerated by the taxpayer although he did not become an employee on taxpayer's payroll until June 1, 1962.

Taxpayer filed a franchise tax return for the fiscal year ended May 31, 1962, reporting net income of $276,134.96 as business income, allocated to New York at 36.72[illegible], equal to $101,477.98, and a tax of $5,581.29. Taxpayer allocated no

portion of receipts from sales of $2,532,256.68 of shipments made from Pennsylvania to points without New York in arriving at the business allocation percentage, claiming that it maintained a permanent or continuous place of business in Pennsylvania. On audit the business allocation percentage was stated at 54.886% by allocating sales of the shipments from Pennsylvania to points without New York at 90% by a finding that such sales were of tangible personal property not located at a permanent or continuous place of business outside New York, and by excluding from the property factor $185,600, being the capitalized value of the rented property in Pennsylvania on the ground that "The rents are not identifiable on page one of the return, and the relationship of landlord-tenant must exist before rent for real property can be considered in the rented property portion of the property factor" (July 16, 1963 letter to taxpayer). It was subsequently determined that the annual rent of $23,200 paid in Pennsylvania had been included in "shipping supplies and expenses" on the return.

With respect to the first issue, section 4.14 of Ruling of the State Tax Commission With Respect to the Franchise Tax on Business Corporations Imposed by Article 9-A of the Tax Law explicitly provides for inclusion of the fair market value of rented real property, within and without the State, in determining the property factor, and fixes the fair market value of such rented property at eight times the gross rent payable during the period covered by the return.

Accordingly, the board of conferees properly held that the propriety of taxpayer's inclusion of the rents payable in Pennsylvania in the property factor should not be questioned merely because the deduction appeared on line 26 of "Deductions" on page one of the return, instead of line 16 on the same page. The rent payable and the landlord-tenant relationship were substantiated by testimony at the hearing and submission of a copy of the lease. I am, therefore, of the opinion that the hearing officer properly determined that the property factor of the business allocation be corrected to reflect capitalization of the rented property in Pennsylvania, pursuant to section 210.3(a)(1) and section 4.14 of the Ruling of the State Tax Commission dated March 15, 1962.

With respect to the second issue, section 210.3(a)(2)(B) of the Tax Law provides that the receipts factor of the business allocation percentage shall be ascertained by computing "sales of tangible personal property not located at the time of the receipt of or appropriation to the orders at any permanent or

continuous place of business maintained by the taxpayer without the state, where the orders were received or accepted within the state and where shipment is made between points outside the state, but only to the extent of fifty per centum of the receipts from the sales referred to in this clause. * * * "

Section 4.16(d) of the State Tax Commission Ruling defines a permanent or continuous place of business as follows:

> "A permanent or continuous place of business maintained by the taxpayer outside of New York is any bona fide office (other than a statutory office), factory, warehouse, or other space outside New York, at which the taxpayer is doing business in its own name in a regular and systematic manner, and which is continuously maintained, occupied and used by the taxpayer in carrying on its business through its regular employees regularly in attendance."

The record reveals that the sole employee of the taxpayer in Pennsylvania was a production supervisor stationed at the contractor's factory. Under these circumstances Example 8, section 4.19(b) of the State Tax Commission Ruling is particularly applicable, and reads as follows:

> "A taxpayer receives or accepts in New York an order for shirts which it fills from stock stored at the Pennsylvania plant of the independent contractor who manufactured the shirts for it. The taxpayer has an arrangement with the contractor under which space at the contractor's plant is leased to the taxpayer for the storage of the shirts manufactured for it and facilities are made available for the shipment of the shirts to the customer from the plant of such contractor by a shipping clerk employed by the taxpayer. If the goods are shipped to the customer in New York, the receipt from the sale is 100% allocable to New York. If shipped to the customer elsewhere, 50% of the receipt from the sale is allocable to New York."

There is some question that the words "space at the contractor's plant" set forth in Example 8 apply where such space consists of an entire second floor warehouse physically separated from the contractor's work premises equipped by the

taxpayer with partitions, skids and conveyors and for which the taxpayer incurred separate maintenance expense for heat, light, cleaning and telephone, even though the contractor's plant encompasses the entire building of which the leased floor is a part. However, during the fiscal year in issue the taxpayer was not considered a regular employee of the taxpayer for its payroll purposes. Therefore, although the exact application of Example 8 may become necessary, in future fiscal periods not in issue, I am of the opinion that the presence of the shipping supervisor did not result in the creation of a permanent and continuous place of business outside the State of New York during the fiscal period involved.

The Scholastic Magazines, Inc. case, and the cases cited therein, furnish additional authority for holding that the mere presence of taxpayer's production manager at the contractor's factory was insufficient to create a permanent or continuous place of business of the taxpayer outside the State. A copy of the Scholastic Magazines memorandum of E. H. Best, Counsel, dated July 16, 1963, is annexed.

Weight must also be accorded to the filing of Pennsylvania franchise tax returns by the taxpayer commencing with June 1, 1962, and the lack of such filing for the fiscal year ended May 31, 1962. While neither such filing nor lack of filing is conclusive as to the issue, such filing as of June 1, 1962, is an act on the part of the taxpayer indicative of a change in status, as of that date, and is of some persuasion in concluding that no permanent or continuous place of business was maintained in Pennsylvania prior thereto. Furthermore, the taxpayer cannot claim double taxation.

Accordingly, I am of the opinion that the hearing officer properly determined that the taxpayer did not have a permanent or continuous place of business in Pennsylvania, pursuant to section 210.3(a)(2)(D) of the Tax Law and section 4.16(d) and Example 8 of section 4.19(b) of the State Tax Commission Ruling dated March 15, 1962.

The determination is, therefore, approved.

/s/ E. H. BEST

Counsel

February 3, 1967
AR:rlp
Enc. (Feb. 6, 1967)

P.S. Please sign three copies of the determination and return the entire file, together with such signed copies, to the Law Bureau for further disposition.

EHB

L 9 (9-66)

BUREAU OF LAW

MEMORANDUM

COPY

TO: Commissioners Murphy, Palestin and Macduff

FROM: E. H. Best, Counsel

SUBJECT: Scholastic Magazines, Inc.
Privilege Years Begun September 1, 1955, 1956, 1957, 1958 and 1959

The question presented herein is whether or not property of the corporate taxpayer, which is in the business of publishing and selling school magazines, was located, at the time of receipt of appropriation to the orders, at any permanent or continuous place of business maintained by the taxpayer outside New York.

The record discloses that the corporation, which is engaged in the publishing of school magazines, was under contract with an independent corporation, McCall Corporation, pursuant to which contract the printing, binding, wrapping and the mailing of the magazine was to be done by the latter corporation at its plant in Dayton, Ohio; that although the contract provided that McCall Corporation should have available at all times sufficient space in its plant for the production of the school magazines, there was no provision in the contract leasing any space to the taxpayer corporation or making any space available to it; that the general and editorial offices of the taxpayer are located in New York City where orders for bulk subscriptions are received; but that the taxpayer, had for the privilege years under review, between ten and twenty-five employees regularly in attendance at the independent company's plant to check the quality and handling of work performed by the independent corporation. Although these employees also received and filled independent subscriptions, the income therefrom was allocated outside of New York. The allocation of income from bulk subscriptions is, therefore, solely in issue.

The precise question here is whether the entire plant of the individual printer (McCall) can be deemed "a permanent or continuous place of business" of the taxpayer under the regulations (See Page 5 of the proposed determination) merely because the taxpayer maintains its operations in the McCall plants, a comparatively few employees whose function, aside from filling individual subscriptions, are merely to check the quality of the work done by the individual printer under its contract. The closest matter to our present case which was considered by the State Tax Commission was the case of the New Yorker Magazine. The New Yorker matter dealt principally with the allocation of advertising revenues, of which there are none in the present case, but it also dealt with the allocation of revenue from subscriptions, which is the same point here involved. The New Yorker also had its

magazine printed by an independent printer at an out-of-state plant. Some employees of the taxpayer visited this plant of the independent printer one day a week for the purpose of doing substantially the same kind of checking work done by the taxpayer's employees in the present case at the McCall plant. In the New Yorker case, the taxpayer conceded finally that its subscription revenues should be allocated entirely to New York since the orders had been received or accepted in New York and since the out-of-state printing plant was not a permanent or continuous place of business of the taxpayer (See Law Bureau memorandum dated February 19, 1956, hereto attached).

The New Yorker contest as to its advertising revenues was abandoned after the adverse ruling of the Court of Appeals in its similar case challenging allocation under the New York City gross receipts tax (Matter of New Yorker Magazine, Inc. v. Gerosa, 3 N.Y. 2d 362). In that case, the Court, distinguished the operations of the McCall Corporation (in the Matter of McCall Corporation vs. Joseph 284 A.D. 404) which consisted of printing in premises owned by McCall outside of the state, from the operations of the New Yorker Magazine. In the New Yorker case the Court stated "Here, the printing was done out-of-State. However, that was activity by an independent printer. The incidental Connecticut duties of appellant's employees in last minute proofreading and revision is of no more moment than, say, the out-of-State solicitation of advertising in the Western Live Stock case." (See Western Live Stock et. al. vs. Bureau of Revenue, 303 U.S. 250.)

Accordingly, I am of the opinion that the hearing officer, in accordance with the provision of Article 413, subdivision 2 of the 5-A Regulations, properly determined that the stationing of a comparatively few of the taxpayer's employees in the offices of the independent printer to do the final checking, does not convert the plant of the independent printer into a permanent or continuous place of business of the taxpayer.

The determination is, therefore, approved. Kindly return the file after disposition.

Counsel

MS:rlp
Enclosure
July 16, 1963

STATE OF NEW YORK

THE STATE TAX COMMISSION

In the Matter of the Application	:
of	:
SKAMPALON, INC.	:
for revision or refund of franchise tax under Article 9A of the Tax Law for the fiscal year ended May 31, 1962.	:

Skampalon, Inc., the taxpayer herein, having filed application for revision or refund of franchise tax under Article 9A of the Tax Law for the fiscal year ended May 31, 1962, and a hearing having been held in connection therewith at the office of the State Tax Commission in New York City on October 19, 1965, before William F. Sullivan, Senior Tax Administrative Supervisor of the Corporation Tax Bureau of the Department of Taxation and Finance, at which hearing Harold Brown, president of the taxpayer, appeared personally and testified, together with William I. Abramson, certified public accountant, and the record having been duly examined and considered by the State Tax Commission,

It is hereby found:

(1) That the taxpayer was incorporated under the laws of New York on or about June 23, 1952;

(2) That on the basis of a report filed and correspondence, the tax was recomputed as follows:

Entire Net Income	$276,324.54
Revised Business Allocation	54.888%
New York Base	151,663.49
Tax at 5½%	$ 8,341.49

(3) That notice of recomputed tax was mailed on January 10, 1964, and application for revision or refund was filed on March 25, 1964;

(4) That the taxpayer is engaged in the manufacture and sale of children's underwear; that the manufacturing is done by an independent contractor at its factory in Blue Ball, Pennsylvania; that to store its inventory of finished goods and to fill and ship orders out of such inventory, the taxpayer has written 5-year leases at an annual total rental of $23,200 for exclusive use of 20,000 square feet on the second floor of the building owned by the independent contractor in Blue Ball, Pennsylvania; that the taxpayer has an employee at the contractor's plant to supervise production and check quality of the goods which is manufactured for it; that the actual filling of orders and physical handling of the goods, shipments, etc. are performed by fourteen employees of the contractor, who work exclusively for the taxpayer in its leased space under the supervision of Herman Zweifach, an employee of the contractor, who was remunerated by the taxpayer for such services for the period January 1 through May 31, 1962, but who was not put on its regular payroll as an employee until the start of the subsequent fiscal year (June 1, 1962); that the taxpayer reimbursed the contractor for the salaries of the shipping employees; that the taxpayer had not filed a franchise tax return with the State of Pennsylvania for fiscal years ending on or before May 31, 1962; that taxpayer filed with the State of Pennsylvania a franchise tax return for the fiscal year beginning June 1, 1962;

that the New York City office of the taxpayer took care of the designing, purchasing, selling, quality control, inventory control, accounting, and received or accepted all the orders for goods;

(5) That Section 4.11 of Ruling of State Tax Commission issued March 15, 1962 reads, in part, as follows:

> "b. A regular place of business is any bona fide office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business. * * * *, where as a regular course of business, raw material or partially finished goods of a taxpayer are delivered to an independent contractor to be converted, processed, finished or improved, and the finished goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business of the taxpayer. * * * * *."

(6) That Section 4.16 d. of Ruling of State Tax Commission reads as follows:

> "A permanent or continuous place of business maintained by the taxpayer outside New York is any bona fide office (other than a statutory office), factory, warehouse, or other space outside New York, at which the taxpayer is doing business in its own name in a regular and systematic manner, and which is continuously maintained, occupied and used by the taxpayer in carrying on its business through its regular employees regularly in attendance."

(7) That Example 8 of Section 4.19 b. of Ruling of State Tax Commission provides:

> "A taxpayer receives or accepts in New York an order for shirts which it fills from stock stored at the Pennsylvania plant of the independent contractor who manufactured the shirts for it. The taxpayer has an arrangement with the contractor under which space at the contractor's plant is leased to

the taxpayer for the storage of the shirts manufactured for it and facilities are made available for the shipment of the shirts to the customer from the plant of such contractor by a shipping clerk employed by the taxpayer. If the goods are shipped to the customer in New York, the receipt from the sale is 100% allocable to New York. If shipped to the customer elsewhere, 50% of the receipt from the sale is allocable to New York."

Upon the foregoing findings and upon all the evidence presented, it is hereby

DETERMINED:

(A) That the property factor of the business allocation be corrected to reflect the capitalization of rented property in Blue Ball, Pennsylvania;

(B) That the taxpayer does not have a permanent or continuous place of business in Blue Ball, Pennsylvania, and the allocation of receipts is in accordance with Example 8 of Section 4.19 b of Ruling of State Tax Commission;

(C) That the tax for the fiscal year ended May 31, 1962 is resettled as follows:

Entire Net Income	$276,324.54
Corrected Business Allocation	53.3715%
New York Base	147,478.55
Tax at 5½%	$ 8,111.32

(D) That the resettled tax does not include taxes or other charges which are not legally due.

Dated: Albany, New York

this 3rd day of March 1967.

THE STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
COMMISSIONER

/s/ JAMES R. MACDUFF
COMMISSIONER

/s/ WALTER MACLYN CONLON
COMMISSIONER